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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 1239

CARROLL T. GLORIOSO,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF SPECIAL APPEALS OF THE
STATE OF MARYLAND

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IN THE

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OCTOBER TERM, 1970

NO.

CARROLL T. GLORIOSO,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF THE STATE OF MARYLAND

Petitioner Carroll T. Glorioso prays a writ of certiorari issue to review the judgments, orders and opinions of the Courts of Appeals and Special Appeals of the State of Maryland in the above-entitled case terminated in Maryland on October 20, 1970 with an order denying *certiorari* review.

Opinion Below.

The order of the Court of Appeals of Maryland is an unreported, silent opinion cited in the Miscellaneous Docket, Number 200, September Term, 1970, denying review of the adverse opinion of the Court of Special Appeals of Maryland in Appeal Number 564, September Term, 1969 (Murphy, C.J.) reported in 10 Maryland Appellate 81, 267 Atlantic Second Reports 812, both set out as Appendix Exhibits E and F, pp. 9-14, 15, *infra.*

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 since rights, privileges and immunities are claimed under the Constitution of the United States (June 25, 1948, Chapter, 646, Statute 929)

(Fourth, Fourteenth Amendments, U. S. Constitution; *Bumper v. North Carolina,* 391, U.S. 543, 88 S. Ct. 1788; *Stoner v. California,* 376 U.S. 483, 84 S. Ct. 889; *Mapp v. Ohio,* 367 U.S. 643, 81 S. Ct. 1684, *Ker v. U.S.,* 362 U.S. 217; *Jones v. U.S.,* 357 U.S. 493; *Shelley v. Kraemer,* 334 U.S. 1, 68 S. Ct. 836; *Voeller v. Neilston Warehouse Co.,* 211 U.S. 531, 61 S. Ct., 379; *Silverthorne Lumber Co. v. U.S.,* 251 U.S. 385; *Waters-Pierce Oil Co. v. Texas,* 212 U.S. 86, 29 S. Ct. 220; *Sully v. American National Bank,* 178 U.S. 289, 20 S. Ct. 935; *Smith v. Maryland,* 59 U.S. 71, 18 How 17; *Barron use of Tierman v. Baltimore,* 32 U.S. 243, 7 Pet 243.)

Questions Presented.

1. Can raiding police, without arrest warrant, arrest a then law-abiding citizen suspect and push him within premises specified in a particularized search and seizure warrant?

2. Is the subsequent search of such transported arrestee then inside the warrant-specified premises constitutionally valid?

3. Does an incomplete trial transcript deprive a convictee of full appellate review, effective representation of counsel, due process and equal protection of law?

4. May an accused be convicted on a trial record silent as to his voluntary and intelligent waiver of constitutional right to trial by jury?

5. Does sentencing as a second offender, contrary to State statute and judicial decision, result in double jeopardy punishment?

6. Is not conviction based on admitted seized evidence vitiated when sufficient probable cause does not appear in the affidavit for search-seizure warrant?

Statement of the Case.

Petitioner was found guilty on November 18, 1969 in the Criminal Court for Baltimore (Prendergast, J.) under Indictment Number 4357/1968 of (a) keeping a place for sale of lottery (Article 27, Section 360, Code of Maryland); (b) possession of

lottery paraphanalia (Article 27, Section 362) and as a second offender in lottery violation (Article 27, Section 366). He was sentenced to one year in prison plus a $1,000.00 fine under Section 360; to the same penalties under Section 362, to run concurrently to each other; and, to two years in the penitentiary under Section 366, to run concurrently with the concurrent sentences of Sections 360-362.

Timely appeal was made to the Court of Special Appeals of Maryland and the convictions were affirmed, *supra.* Timely petition for a writ of *certiorari* was filed with the Court of Appeals of Maryland and denied, *supra.* Notice of intention to petition for writ of *certioari* to this Court was made. (A:H; p. 24, *infra)*

Statement of Facts.

On a "tip" from a "reliable informer" FBI agents investigated the movements of a Vincent Iannone and Leslie Sellman, and, after days of routine record checking and observation of a multi-story apartment complex concluded that Apartment 910 in a downtown Baltimore residential building was the situs of an inter-state gambling operation. Upon application-affidavit presented to a State judge, the Federal agents secured a search-seizure warrant for only the specific apartment. Enlisting physical aid from Baltimore City police, they secreted themselves in apartments 906 and 908 on June 13, 1968.

At about 2:30 p.m., Petitioner knocked on the door of 910 announcing, "It is me." Agents and policemen raced across the public hallway. Agent Faulkner ran past Petitioner, opened the 910 door and entered. Police Lieutenant Andrew grabbed

Petitioner, and over protest, pushed and wrestled Petitioner inside 910 where Petitioner was searched. Lottery paraphanalia was in full view once entry was made by police. A key was taken from Petitioner which operated the door to 910, providing a nexus to the apartment. Petitioner, possessed nothing else connected with lottery operation. He was not a nominee on the warrant.

At trial, without a jury, Petitioner, Iannone and Sellman were represented by a veteran Baltimore criminal attorney who filed written and oral motions to quash the warrant and to suppress seized evidence on constitutional grounds. All motions were denied.

The illegality of arrest, search and seizure and warrant and denial of motions were assigned as error on direct appeal. Double jeopardy in sentencing, the arrest-warrant illegality and silent trial record were presented on State *certiorari.*

Petitioner contends his convictions are reversible and in argument thereto proffers:

Reasons For Granting The Writ

1.*Certiorari* should be granted to determine (a probable first impression factual situation) the extent to which law enforcement officers may go to physically force a law-abiding citizen inside premises specified in a particularized search and seizure warrant.

Sections 360, 362 and 366 of the Annotated Code of Maryland (A;D; pp. 7-8, *infra)* are *malum prohibitum* misdemeanors proscribing keeping a place for lottery sale, mere

possession of lottery tickets and setting additional sentence for second offenders by *addendum* to a current indictment.

In this unique situation, FBI agents attested to affidavit (A:B; p. 5, *infra*) that they were of the opinion that interstate lottery was being conducted in a specific Baltimore apartment and secured a State, not Federal, search and seizure warrant (A:C; p. 6, *infra*) for the particularized premises. Significantly, Petitioner and named co-defendants, specified by name in the affidavit, were not nominees for arrest, search or seizure in the issued warrant. The FBI, which conducted the entire investigation, enlisted local police as assistants in the raid.

On June 13, 1968, at 2:30 p.m., agents and police hid inside Apartments 906 and 908 and, using door peepholes, saw Petitioner walk down the public hallway and knock at Apartment 910, the suspect apartment, and say, "It is me." Police swarmed out of hiding, affiant Agent Faulkner ran past Petitioner to open the door to 910 and enter. Baltimore Police Lieutenant Andrew, second in the "blitz", grabbed Petitioner in the hallway and, over protest, pushed and wrestled him inside the apartment while announcing, "I have a search and seizure warrant * * * and you are coming in the room (A:G; 16-23, R-23, 64)

Faulkner testified Petitioner was standing in the public hallway when the agent entered the apartment. Andrew maintained Petitioner had one foot over the apartment doorsill. Both State witnesses testified Petitioner was committing no crime in their presence, view or senses (A:G: pp. 17, 18, R-62, 77-81). No other raiders were called by the State to resolve the patent variance in sequestered State witness testimony as to Petitioner's situs.

Timely and continuing objections to suppression of evidence brought by illegal arrest and subsequent search and seizure were made on constitutional grounds of Federal question (Brief, *infra,* Reason III; A:G: R-6, 14, 54, R-6, 14 57, 82-84, 90, 96, 97, 108, pp. 18, 19, 20, *infra*).

Petitioner contends he was standing in a public hallway committing no crime whatever which police admitted indicating they had no probable cause to believe a misdemeanor had been or was being committed in their presence or their senses or that the Petitioner was a misdemeanant at that time and place (*Contra,* Opinion, Court of Special Appeals, A:E p. 13, l. 26-30, *infra,* citing *Robinson v. State,* 4 Md. App. 515, 243 A.2d 879.

He was illegally arrested without a warrant in the public hallway by Lieutenant Andrew (*Henry v. U.S.,* 61 U.S. 98 (1960) *Cornish v. State,* 215 Md. 64, 137 A2d 170, *McChan v. State,* 238 Md. 149, 207 A2d 632) and should have been searched, incident to the arrest, in the public hallway and not inside the apartment into which he was pushed to bring him within the aurhority of the warrant (*Agnello v. U.S.,* 269 U.S. 20 (1925).)

The arrest was illegal. Petitioner was not a warrant nominee. Police, in the hallway, had no probable cause to show he was an active participant in a suspected lottery operation discovered inside the apartment after the illegal hallway arrest.

> "Common rumor, report, suspicion, or *even strong reason to suspect* is not sufficient to support an arrest. Probable cause exists *if facts and circumstances known to the officer* warrant a prudent man to believe an offense has been committed and the arresttee is the person who committed it." (*Henry, supra)* (Emphasis supplied).

The words, "It is me" and earlier observations of "being in the vicinity of 910" (never seen entering or leaving 910) can raise many presumptions, illicit or innocent. The words, however, *per se*, do not give rise to a sufficiently exclusive predicate upon which to base a rational inference from which a Trial Court could be convinced beyond a reasonable doubt or to a *prima facie* belief that Petitioner was part and parcel of a yet-to-be-ascertained gambling operation.

Query: Would a deliveryman, salesman or any other person who called at that doorway be subject to arrest outside in the hallway and be permitted to be pushed or ordered inside the apartment where a subsequent search could reveal his possession of contraband or fruits of a crime as permitted under the terms of the warrant?

Petitioner asserts the answer to be "No." He prays this Court grant *certiorari* so that this important question of constitutional rights versus police latitude be settled by this Court for the benefit of all American citizens.

2. *Certiorari* should be granted to determine if such transported person be subject to valid search and seizure and conviction from the admission of things seized.

Petitioner has been unable to locate an "on all fours" factual situation or decision of this Court on the issue. The "pushed in" person may have no interest, proprietory, possessory or otherwise in the premises and, therefore, have no standing to complain of Fourth Amendment violation of unreasonable search and seizure. (*Jones v. U.S.*, 362 U.S. 257, 80 S. Ct. 725, 78 ALR2d 246 explication). He may be

wrongfully on premises – but not committing a crime before being brought, by police, onto the premises. Police entry on premises, in matters misdemeanor, is a "shadowy and elusive area" (76 ALR2d 1432).

Petitioner reasserts illegal arrest and suppression of items seized thereunder (*Wong Sun v. U.S.*, 371 U.S. 471 (1963)). Prior to *Mapp v. Ohio*, 367 U.S. 643, Maryland elected to follow the Common Law doctrine in matters felony; but, *pro tanto*, adopted the Federal exclusionary rule in matters misdemeanor as to the applicability of the Fourth Amendment. (Acts of Maryland 1929, Chapter 194 (Bouse)). Since *Mapp*, the exclusionary rule applies and Petitioner contends evidence seized following illegal arrest is excludable and alleges the affirmations of convictions below to be reversible error.

A key taken in search inside the apartment operates the door to 910 and provided a nexus from which inference upon inference resulted in convictions of "keeping a place for sale of lottery" and "possession of lottery tickets" despite the fact that he had no manucaption of lottery-connectedevidence or physical possession of proscribed materials upon his person – and he was not inside the apartment when raiders burst in. Without the key, there could be no convictions. The key, if found outside in a proper incident to arrest search would be inadmissable as a fruit of illegal warrantless arrest.

Petitioner prays *certiorari* issue to resolve a Federal question of substance believed not to have been heretofore determined by this Court; and, to determine or define the limits to which law enforcement officer may go under like circumstances.

3.*Certiorari* should be granted to determine if full appellate review is a constitutional right under the Sixth Amendment for Baltimoreans as it appears to be in other Federal and State jurisdictions.

Maryland holds there exists no constitutional right to an appeal from a criminal conviction. In Baltimore City, custom and usage eliminates transcription of counsel argument to jury or Trial Court, sitting without a jury. The transcript here is typical (A:G; R-10, 84, 86, 119, pp. 20, 21).

The Tennessee Court of Criminal Appeals (*Schoonover v. State,* Tenn. Crim. App. , 3 CrL 2186, ruled:

> "In the absence of a complete transcript of the proceedings at trial a defendant is effectively denied full and complete appellate review of his conviction. If the court reporter is a State employee, the inadequacy of the transcript is due to 'State action' and, according to the Tennessee Court of Criminal Appeals requires reversal and a new trial.
>
> "* * * failure of the official state reporter, employed and paid by the State* * * to furnish indigent defendants a complete transcript including the argument of counsel* * * presents a case wherein the defendant has been effectively deprived of his constitutional right to a full and complete review of his conviction.
>
> "It would be a strange anamoly indeed to say that the State * * * could cut off an indigent's right to full appellate review of his conviction. Such a grotesque contradiction can never find sanction in the law."

Conversely, in the United States Circuit Court for the Third Circuit (*Virgin Islands v. Turner*, 3 CrL 2401, *Virgin Islands v. Oliver*, 360 F2d 247, and *U.S. v. Tucker*, 267 F2d 212, where complete record transcript is required, the Court cautioned that "overambitious openings" or inflammatory comments of counsel can precondition a jury to conviction – which would be violative of the defendant's constitutional rights and open the door to appellate reversal.

Without counsel argument in a transcript, comments or legal discussion of Federal questions do not appear and a defendant can be estopped by the silent record or rules from redress of grievance.

The Maryland Court of Special Appeals in *Allen v. State*, No. 150, September, 1968, *unreported per curiam*, filed January 30, 1969, rejected the *Schoonover* rationale when presented and said:

> "Rule 32 of the Rules of the Supreme Bench of Baltimore City, dated April 1, 1961 (as amended) provides: 'In the trial of a case, the court stenographer shall take down any * * * argument of counsel when requested to do so by any party to the case or his attorney.' By its own terms, Rule 32 indicates that reporting of counsel argument is optional at the request of the parties.
>
> "* * * Maryland rules do not require that a transcript of all aspects of a trial be placed before the appellate court in order for there to be a valid review (Opinion, pp. 3-4)

In *Jacobs v. State*, 6 Md. App. 238, 251 A2d 33, the same court rejected *Schoonover* and its implication citing trial counsel's failure to invoke the local rule of procedure. Again, in *Hall v. State*, 6 Md. App. 356, 251 A2d 219, Local Rule 32 was cited to preclude concurrence with Tennessee and Federal rulings. The same court did not deign to mention the extra cost collected by State-paid court stenographers for the invoked transcription or mention the elimination of brief extracts from the record in criminal appeals where the entire transcript is made part of the record. And, some 80 per cent of criminal appeals are those filed by indigents unable to assume stenographic costs.

In *Wilkins v. State*, 5 Md. App. 8, 245 A2d 80, the Court held argument by counsel is not necessary in a trial transcript unless timely objection to prejudice or impropriety be made at trial or unless counsel shows a useful purpose to include such statements in the transcript, citing *Brown v. State*, 1 Md. App. 571.

In *Griffin v. Illinois*, 351 U.S. 12, this Court ordered a transcript be delivered an indigent criminal defendant to permit full appellate review of his conviction. *Griffin* did not say a partial transcript or an inadequate transcript from which appellate counsel, often not trial counsel, must work to perform a genuine and effective representation of his client, retained or appointed. *Griffin*, perhaps for the additional cost or labor or whatever, has been criticized as but another incursion into State criminal procedure (*Gideon v. Wainwright*, 372 U.S. 342, *Mapp, supra*, *Escobedo v. Illinois*, 378 U.S. 478, *Miranda v. Arizona*, 384 US 436) and other recent decisions of this Court in its proper exercise of its power of supervision.

Should a Maryland trial attorney, under *Wilkins-Brown* object to inflammatory-prejudicial or other harmful statements

or misquoting of law, there exists no transcription for "read-back" to determine the validity of the objection or proof for mistrial. To show useful purpose for that not yet in being at trial calls for a clairvoyant, not an advocate. And, the need for counsel argument before a jury is most imperative because Maryland remains the only state in the nation where the criminal jury is the trier of both fact and law, where counsel is permitted to argue the law and the court's instructions on the law are "strictly advisory."

Petitioner contends a Baltimore citizen at criminal trial is deprived of equal protection available in other jurisdictions and prays *certiorari* lies in that a substantial question of conflicting decisions in courts of appeals of different states exists which has not been settled by this Court.

4. *Certiorari* should be granted to determine if Petitioner's right to due process has been violated by a silent record anent his personal, voluntary and intelligent waiver of right to a trial by jury.

The pertinent area (A:E; R-4) pp. 21,22, *infra*) shows only trial counsel's proffer that Petitioner understood the waiver of his constitutional right to jury trial and waived it to select a court trial.

Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, requires an "intentional relinquishment and abandonment of a known right or privilege" and full understanding of a right to trial by jury and the consequences of waiver. Such waiver must be truly voluntary and should be given the accused in open court *(McCarthy) v. U.S.*, 394 U.S. 466. One of *Miranda's, supra*, strongest teachings is that waiver of constitutional rights cannot

be found from a silent record (Fifth, Sixth and Fourteenth Amendments); *Fowler v. State*, 6 Md. App. 651, 253 A2d 409 at 423.

Petitioner contends the failure by defense and prosecution counsel and the experienced Trial Court to ascertain the understanding of the jury trial waiver denied him due process of law and should vitiate his convictions. He prays *certiorari* be granted so that summary reversal might ensue.

5. *Certiorari* should be granted to determine if sentencing subjected Petitioner to double jeopardy punishment.

Count Two (Article 27, Section 360, (A:D, p. 7, *infra*) provides for a maximum $1,000.00 fine and not more than one year in prison, or both. Count Four (Article 27, Section 362, (A:D, pp. , *infra*) imposes the same maximum penalty. The *addendum* (Article 27, Section 366, (A:D, p. 8), for second offender, imposes "not less than two nor more than five years" in the penitentiary. Petitioner was fined the maximum $1,000.00 and one year on both Count Two and Four, to run concurrently to each other and two years under the *addendum*, to run concurrently with Counts Two and Four, plus court costs.

On State *certiorari*, Petitioner asserted double jeopardy for one year of imprisonment. He contends he was sentenced to two years for being a second offender, *per se*, and was not sentenced to more than one year under the present indictments. (In Maryland, Section 366's "Not less than two years" is directory and not mandatory under the O'Dunne Act (Acts of 1906, Chapter 536, Article 27, Section 643, Code, *supra*)

In *Reid v. State*, 10 Md. App. 6, 267 A2d 332, the Court, when discussing an identical *addendum* section on narcotics punishment, ruled:

> "The Court imposed a sentence of one year on the conviction of the current offense * * * to run concurrently with a sentence of two years it imposed on the *addendum*. Although Appellant does not question these sentences we observe that this was error. Code 27, Section 313C(b) merely authorizes a greater punishment upon conviction of a current offense when the accused is found to be a subsequent offender than when he is not. *It does not authorize a sentence upon being found a subsequent offender separate from a sentence imposed upon conviction of the current offense* (See *Simmons v. State*, 8 Md. App. 355, 259 A2d 814). However since two years imposed on the *addendum* did not exceed the maximum authorized * * * Appellant was not harmed. (Emphasis supplied)

In *Simmons, supra*, is found:

> "An *addendum* to the indictment charged Appellant with being a second offender * * * he was found guilty * * * the judge imposed a sentence of five years as a second offender on the current offense and five years as a second offender, to run concurrently. It is clear that Code 27, Section 300 (as in Section 366) authorizes only one sentence. *The punishment is not for being a second offender. It is for the new crime only, but it is heavier if the defendant has theretofore been convicted as designated. (Murray v. State*, 236 Md. 375, 203 A2d 908, *Beard v. State*, 216 Md. 302, 140 A2d 672, *Garringan v. Superintendant*, 218 Md. 662, 142 A2d 431) However, since sentences were imposed concurrently, Appellant was not harmed." (Emphasis supplied)

Here, the obverse obtains and Petitioner is harmed. He was sentenced to a total one year and fine on the current convictions but sentenced to two years as a second offender, *per se*. The two years would be in addition to the three months sentence of 1966. Had Counts Two and Four been imposed consecutively Petitioner would not have been harmed. The two years for second offender, or one year in excess of the current punishment, Petitioner contends is double jeopardy sentencing under the Fifth Amendment.

Petitioner prays *certiorari* issue so that sentence may be vacated.

6. *Certiorari* should be granted to review the constitutionality of the search-seizure warrant and the admissability of evidence.

The warrant (A:C; p. 6, *infra*) issued on purported probable cause found in the affidavit (A:B; pp. 2-5, *infra*) to which written and oral motions for suppression were timely made (A:G; R-6, 14, 54, 56, 82-83, 90, 96, 108, pp. 18, 19, 20, *infra*). Counsel argument was not transcribed (A:G; R-10, 84, 86, 119, pp. 20, 21 ,*infra*). The Trial Court ruled a public hallway in a multiple apartment dwelling to be an appurtenance to a tenant's apartment and therefore part of the apartment particularized in the specific warrant; and, that Petitioner, standing within the appurtenance with the apartment door closed, was then and there committing a misdemeanor in the police peephole view (A:G; R-87-99, pp. 22, 23, *infra*).

The lower appellate court ruled the facts that Petitioner was not named in the warrant, whether he was lawfully on the premises searched, whether a public hallway is an appurtenance

were but questions beclouding the issue of illegal arrest. It held Petitioner's "obvious clandestine identification with the apartment" vouchsafed he was a participant in a misdemeanor being committed in the presence of the peephole police (A:E; Opinion. pp. 13, 14, *infra*) The Court of Appeals' silent *certiorari* denial order affirmed this conclusion.

The appellate court below adopted the Appellee brief argument citing *Aguilar v. U.S.*, 378 U.S. 108, *Beck v. Ohio*, 379 U.S. 89, *U.S. v. Ventresca*, 380 U.S. 102, *Jones v. U.S.*, 362 U.S. 257 and *Spinelli v. U.S.*, 391 U.S. 933 to find existing probable cause. Petitioner contends *Henry, supra*, is more applicable and will not rue the carousel in the circumlocution to affirmation of conviction found in the opinion (A:E; p. 14, *infra*.)

The affidavit, Petitioner contends, is but a thing built by placing suspicion upon suspicion upon suspicion connected with the mortar of innuendo which is then presented as an episyllogistic predicate for a structure labeled conclusionary probable cause. *Falsus ab initio, falsus in terminum* applies.

A reading of the 1968 affidavit by FBI agents reveals "a confidential informant who has furnished information which has proven to be reliable in the past" – a bland statement without showing a former reliability or underlying circumstances for the currently given information. Then there is the bald assertion that "an" apartment is to be rented as a lottery situs.

Then the exclusive FBI investigation reveals Sellman is seen at his home, Sellman leases Apartment 910 and rents furniture and, under the name "Mazer" had been "arrested" in Las Vegas and Philadelphia. The arrest charge or case disposition is not

given. An ear to the door eavesdrop hears an unidentified voice say, "Lay off" and "All we can take is $200". (No entry is then made (76 ALR2d 1432, *et seq*) for a misdemeanor being committed within the agent's senses.)

Two unidentified men leave the 910 apartment and one uses a car registered to the Sellman company. Petitioner is placed "in the vicinity of Apartment 910" but is never reported entering or leaving 910. Another unidentified man is seen to enter a car registered to Petitioner. A nexus is attempted by stating Petitioner had been "arrested" in a lottery raid, and, a newspaper article, not a court record, is used to say Petitioner was found guilty of lottery possession in 1965. The 910 long distance phone call records show calls placed to "Pennsylvania", Puerto Rico and a Washington, D. C. restaurant.

FBI headquarters reports a "reliable informer" (not qualified) classed the District restaurant as a gambling hangout. FBI records reveal a part owner of the restaurant had been "arrested" by IRS agents on gambling charges. What charge and what disposition are not mentioned. Petitioner is seen to put white paper under his sports shirt.

All this suspicion or even "strong reason to suspect" results in an FBI agent's opinion that 910 is a situs for interstate gambling operations — and a State warrant is sought and obtained for the premises of 910 only.

Query: Would a U.S. Commissioner or Federal District judge issue a warrant based on such an innuendoed affidavit, and, if so, why was not a Federal warrant obtained?

The affiant presented his presumptions — yet opposite presumptions emerge from the same document. When two presumptions arise, the most favorable to the suspect-defendant is to be adopted. "Lay off" is gambling jargon or a request to stop arguing or teasing. "All we can take is $200" could be maximum bet or it could be the price agreed upon by vending machine supplier Iannone or any other legitimate business transaction. A phone call with unnamed conversationers to a restaurant, allegedly a gambling hangout, could be for the placing of a bet or getting "the line", or, to make a reservation for dinner. That the call was answered by a co-owner "arrested" on "gambling charges" is very wide conjecture. The answering person was never named in the affidavit.

This is not a case confining an issuing magistrate to niggardly limitations on his common sense (*Ventresca, supra*) or a *Jones, supra*, marginal case. It is an instance of a poorly investigated case rife with only the deductions of an overly suspicious agent who framed an inadequate affidavit and sought out an accommodating judge. The affidavit lacks the work of a prudent officer who knows facts and circumstances of a crime in progress.

If the "preferential treatment" of warrants in non-marginal instances can be utilized by intervenor magistrates and appellate courts (in this era of law and order syndrome) then the principle of fundamental fairness and equal protection calling for the criterion of the prudent man determination may well be a thing of the past to the detriment of the future.

Petitioner, contending this affidavit fails to provide a sufficient basis for the issuance of a valid warrant, prays this

Court issue *certiorari* to the end that all seized evidence be suppressed and the convictions of Petitioner be reversed.

Conclusion.

For the reasons stated herein, *certiorari* should be granted.

Respectfully submitted,

ANGELO V. GLORIOSO
JOHN D. HACKETT

Attorneys for Petitioner.

APPENDIX A.

Docket Entries

(Criminal Court of Baltimore, Indictment No. 4357, May Term, 1968; State of Maryland v. Carroll T.Glorioso, Defendant.)

November 18, 1969 – Motion to quash, filed, heard and overruled (Prendergast, J.)

November 18, 1969 – Verdict: Not guilty, 1st and 3d count; Guilty, 2d and 4th counts. Guilty as to *addendum.*

December 23, 1969 – Judgment: One (1) year from 23 December 1969 under the jurisdiction of the Department of Correctional Services in each count to run concurrently plus fined $1,000.00 and pay Court costs.

Judgment as to *addendum:* Two (2) years from 23 December 1969 under the jurisdiction of the Department of Correctional Services, to run concurrent.

January 5, 1970 – An Appeal to the Court of Special Appeals of Maryland filed by Alan H. Murrell, attorney for Defendant.

July 24, 1970 – Opinion, Appeal No. 564, September Term, 1969, Judgments affirmed, costs to be paid by Appellants, Court of Special Appeals (Murphy, C. J.).

October 20, 1970 – Order, denying Petition for Writ of Certiorari, Court of Appeals of Maryland, (Hammond, C.J.)

APPENDIX B

(Police Department, City of Baltimore, Operations Bureau, Affidavit, Form 67/189)

Affidavit

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

David E. Faulkner, Special Agent of the Federal Bureau of Investigation deposes and says that on April 16, 1968, a confidential informant who has furnished information which has proven to be reliable in the past, advised the following:

That Leslie Neil Sellman, also known as Leslie Mazer and Leslie Musto, was employed by Vincent and Tony Iannone, who by the informant's personal knowledge, operate the Atlas Vending Company of 322 West Baltimore Street and that Sellman was there living at an aprtment in the 1200 block of North Calvert Street. About two weeks prior to April 16, 1968, Sellman had personally advised the confidential informant that he, Sellman, had been given money by Tony Iannone to rent an apartment somewhere in Baltimore for the purposes of booking numbers. Also that Iannone had given Sellman money to pur ase furniture to furnish the apartment. However, Sellman stated to the informant that he kept the money and rented the furniture for this apartment. On April 16, 1968 a check of the apartment at 1210 North Calvert Street disclosed that one of the mail boxes contained the names Mikalajunas, Bartlett and Sellman.

On April 17, 1968 Sellman was observed at the apartment at 1210 North Calvert Street.

On May 6, 1968 Edward Jutras Aaron Rents, Inc., 7350 Harford Road, advised your affiant that on March 6, 1968

Leslie Sellman had rented furniture for an apartment at 111 West Center Street.

On May 7, 1968 Kathy Gibbons, Manager, Washington Park Apartments, 111 West Center Street, advised that Leslie Sellman had rented apartments 910 in the early part of March, 1968, signing a one year contract.

On May 22, 1968 Catherine Menkel, Desk Clerk, Washington Park Apartments, 111 West Center Street, advised that in early March she had rented apartment 910 to Leslie Sellman, the tenant, and one other individual. Mrs. Menkel identified a photograph of Tony Iannone and Leslie Sellman as the two individuals to whom she referred. Mrs. Menkel stated that the man identified as Tony Iannone paid her $100 as a deposit and made the agreement with her for the apartment.

The individual identified as Leslie Sellman is identical with Leslie Neil Mazer, F.B.I. No. 514658-C, who has been arrested in Philadelphia, Pennsylvania under the name Leslie Musto, and in Las Vegas, Nevada, under the name Leslie Neil Mazer.

On May 31, 1968 while standing in the public hall in front of apartment 910, 111 West Center Street, at 4:35 p.m., your affiant heard a male voice inside apartment 910 state, "All we can take is $200.00." The sound of what appeared to be an adding machine was also heard to be coming from inside this room. Thereafter, prior to 5:40 p.m. your affiant heard a male voice inside apartment 910 state the words "lay off". At about 5:40 p.m. two white males were observed leaving this apartment. Outside of the building one of the white males entered a 1968 Lincoln automobile, temporary Maryland license number 176511. The other individual entered a 1968 Cadillac, license number unknown. The Department of Motor Vehicles advised your affiant that this license was registered to Atlas Vending Company, 1109 Hollen Road.

On June 5, 6, 7 and 10, 1968 an observation in the vicinity of apartment 910, 111 West Center Street, revealed the presence of both of the individuals observed on May 31, 1968. It is noted that on all of these dates there was no activity prior to 1:30 p.m. and on June 5, 1968, individuals had left the apartment by 6:02 p.m.

On June 6, 1968 Special Agent Marion Wright of the Federal Bureau of Investigation advised your affiant that the individual had, after leaving the apartment house at 111 West Center Street, entered the 1968 Cadillac. It was registered to Carroll Glorioso. Your affiant identified a photograph of Carroll Glorioso as being identical with the individual seen in the vicinity of apartment 910 on May 13, 1968 and June 5, 6, 7 and 10, 1968. Carroll Glorioso was arrested by the Baltimore Police Department on October 7, 1965 on charges of lottery in raid on the Club Diamond, 600 East Baltimore Street, of which he was part owner. The Baltimore News-American, in an article appearing on January 5, 1966, advised that Glorioso was found guilty of gambling charges and given a three month city jail term by Judge Foster.

A check of the records of the C&P Telephone Company reveal that the telephone number for Leslie Sellman, apartment 910, 111 West Center Street is 837-5861. Records indicate that long distance calls have been made from this telephone during the months of April and May, 1968 to San Juan, Puerto Rico, Washington, D. C. and Pennsylvania. The number called in Washington, D.C. is 628-6454. On June 12, 1968, your affiant was advised by the Federal Bureau of Investigation Washington, D. C.that telephone number 628-6454 is listed to Billy's Restaurant. 1025 Vermont Avenue, N. W. Your affiant was further advised that the owner of Billy's Restaurant, Richard A. McCaleb and David F. McGowan, an associate of McCaleb's were arrested by Internal Revenue agents in Alexandria, Virginia on gambling charges in January, 1968.

The F.B.I. in Washington, D.C. was advised by the Intelligence Unit of the Internal Revenue Service that McCaleb and McGowan are conducting a large scale operation in the Washington, D. C. area which includes sports bets, horse bets and numbers. The F. B. I., Washington, D. C. also advised that an informant of theirs advised that a gambling crowd hangs out at Billy's Restaurant, 1025 Vermont Avenue. N. W., Washington, D. C. This above activity was reported being conducted in March, 1968 at 1025 Vermont Avenue, N. W., ashington, D.C.

About 1:15 p.m. June 12, 1968, Carroll Glorioso was observed to park his 1968 Cadillac in the All Right Parking Lot at Center and Cathedral Streets. Just before leaving his auto Glorioso was observed, by your affiant, to conceal sheets of white paper under the front of the yellow sport shirt he was wearing. Within a few minutes, Glorioso was observed on the 9th floor of the apartment building at 111 West Center Street in the vicinity of Apartment 910.

Your affiant, David E. Faulkner, has been a Special Agent of the Federal Bureau of Investigation for 3½ years, specializing in gambling investigations for the past 10 months. It is the opinion of this affiant that gambling activity is being conducted, on an interstate basis, in apartment 910, 111 West Center Street.

/s/ DAVID E. FAULKNER
(Signature of Affiant)
Special Agent - Federal Bureau of Investigation

/s/ MARION M. WRIGHT
(Signature)
Special Agent - Federal Bureau of Investigation

/s/ JOSEPH CARTER
Judge

APPENDIX C

(Supreme Bench or Municipal Court of Baltimore City, Operations Bureau, Search and Seizure Warrant, Police Department, Form 67/187)

TO: Any Police Officer of Baltimore City:

Affidavit having been made before me by David E. Faulkner and Marion Wright, Special Agents, Federal Bureau of Investigation that they have reason to believe that on the premises known as Apartment 910, Washington Park Apartments, 111 West Center Street in the City of Baltimore, there is now being concealed certain property, namely lottery slips and related gambling paraphanalia which is in violation of the Laws of Maryland pertaining to Annotated Code of Maryland, Article 27, Sections 356-358 and 360-361 (Lotteries) and I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are therefore commanded, with the necessary and proper assistants, to search forthwith the premises herein above described for the property specified, executing this warrant and making the search; and if the property be found there, to seize it; and if upon execution of this warrant, there are found persons then and there engaged in the commission of a crime, arrest those so participating; leaving a copy of this warrant with an inventory of the property seized and returning copy of said warrant and inventory, if any, to me within five days after execution of this warrant; or, if not served, to return this warrant to me within five days after its expiration, as required by law.

Dated this 12th day of June, 1968

SIGNED
JOSEPH L. CARTER
Judge

APPENDIX D

(Relevant State Statutes)
(Annotated Code of Maryland, 1957, as amended 1969)

ARTICLE 27, Section 360:

"If any person shall keep any house, office or other place for the purpose of selling or bartering any lottery ticket, policy, certificate or any other thing by which the vendor or other person promises or guarantees that any particular number, character, ticket or certificate shall, in any event or on the happening of any contingency in the nature of a lottery entitle the purchaser or holder to receive money, property or evidence of debt, he shall be subject to indictment, and upon conviction, he shall in the discretion of the court be fined a sum not exceeding one thousand dollars, or imprisoned for a period not exceeding one year, or he may be both fined and imprisoned (citations of antecedent statutes omitted).

ARTICLE 27, Section 362:

"If any person shall bring into this state any lottery ticket, policy, certificate or anything by which the vendor or other person promises or guarantees that any particular number, character, ticket or certificate shall in any event, or on the happening of any contingency in the nature of a lottery, entitle the purchaser or holder to receive money, property or evidence of debt, or if any person shall have in his possession in this State any book, list, slip or record of the numbers drawn in any lottery, whether in this State or elsewhere, or any book, list, slip or record of any lottery ticket, or anything in the nature thereof mentioned in this section or of any money received or to be received from, or the sale of any such lottery ticket or thing in the nature thereof as aforesaid he shall be liable to indictment and upon conviction shall in the discretion of the Court be fined any sum not exceeding one thousand dollars, or shall be imprioned for a period not exceeding one

year, or shall be both fined and imprisoned; provided, however, that this section shall not apply to any person who may have possession of any of the articles herein mentioned, for the purpose of procuring or furnishing evidence of violations of any of the provisions of law relating to lotteries (citations of antecedent statutes omitted)"

ARTICLE 27, Section 366:

"If any person shall be a second time convicted of any of the offenses mentioned in this article relating to lotteries, he shall upon conviction be confined in the penitentiary not less than two nor more than five years; and any recovery of penalty for violating any of the provisions of this article relating to lotteries, whether by indictment or action for debt, or before a justice of the peace, shall be regarded as the first conviction under this section.

APPENDIX E.

(In the Court of Special Appeals of Maryland, Number 564, September Term, 1969, Vincent Iannone, Leslie N. Sellman and Carroll T. Glorioso v. State of Maryland, Opinion by Murphy, C.J., Filed July 24, 1970)

On June 13, 1968 a warrant was issued authorizing search of apartment 910 of the Washington Park Apartments in Baltimore for illegal lottery slips and related gambling paraphernalia. The warrant was executed the same day and resulted in the seizure of evidence indicating that the lottery laws were being violated on the premises. Appellants were subsequently charged with various lottery offenses and the incriminating evidence seized under the warrant was introduced against them at their joint court trial. Appellants Iannone and Glorioso were each convicted of keeping a room (apartment 910) for the purpose of selling lottery tickets and possession of lottery slips. Appellant Sellman was convicted of keeping and permitting a room (apartment 910) to be kept for the purpose of selling lottery tickets. Appellants jointly contend on appeal that the search warrant was issued without probable cause and was therefore invalid.

In the application for the warrant, the affiant, an F.B.I. Agent, recited that "a confidential informant who has furnished information which has proven to be reliable in the past" advised that Leslie Sellman was employed by Vincent Iannone, operator of the Atlas Vending Company; that two weeks prior to April 16, 1968, the informant was told by Sellman, who lived at 1210 North Calvert Street, that he had been given money by Tony Iannone to rent and furnish an apartment somewhere in Baltimore for the purpose of booking numbers; that on May 6, 1968, a representative of a furniture rental company advised the affiant that Sellman had rented furniture for an apartment at 111 West Centre Street (the Washington Park Apartments); that

on May 7 and 22, 1968, representatives of the Washington Park Apartments advised that Sellman and Tony Iannone had together rented apartment 910 for one year; that on May 31, 1968, the affiant was standing in the public hall in front of apartment 910 at 4:35 p.m. when he overheard a male voice inside the apartment say "All we can take is $200.00," followed by the sound of an adding machine; that on the same day, the affiant heard a male voice inside apartment 910 use the words "lay off"; that at 5:40 p.m. the same day two males left apartment 910 and entered separate Cadillac automobiles, one of which was registered to the Atlas Vending Company; that on June 5, 6, 7 and 10 these same men, one of whom interim investigation revealed to be Glorioso, were again observed "in the vicinity" of apartment 910; that Glorioso had previously been convicted on gambling charges in 1966; that Sellman had previously been arrested in Philadelphia and Las Vegas; that the telephone in apartment 910 was listed to Sellman and a number of long distance calls had been made therefrom, including calls to a Washington number listed to two named individuals arrested on gambling charges in January, 1968 and known to the Intelligence Unit of Interval Revenue Service to be conducting a large scale gambling operation in Washington; and that on June 12, 1968, Glorioso was observed to park his car, "conceal sheets of white paper" under the front of his shirt, and then go to the vicinity of apartment 910. On the basis of these allegations, the affiant concluded that gambling activity was being conducted on an interstate basis in apartment 910.

That a search warrant may properly issue based on hearsay information not reflecting the direct personal observations of the affiant is well settled, so long as the magistrate is informed of some of the underlying circumstances from which the affiant could reasonably conclude that the hearsay information was reliable and that the items sought to be seized were within the place to be searched. *Grimm v. State*, 6 Md. App. 321; *Scott v. State*, 1 Md. App. 481 We think it clear that an undisclosed informant's reliability is not established by the affiant's mere

unsupported and unparticularized conclusory assertion that he has "furnished information which has proven to be reliable in the past." See *Aguilar v. Texas*, 378 U.S. 108; *Gatewood v. State*, 244 Md. 609; *Frey v. State*, 3 Md. App. 38. But where, as here, the information provided by the informer's tip is corroborated by independent police work undertaken by the affiant, the details of which are recited in the warrant application, we think the informer's tip, together with the other allegations in the warrant, may be collectively considered in determining whether probable cause existed for the issuance of the warrant.[1] See *Spinelli v. United States*, 391 U.S. 933; *Price v. State*, 7 Md. App. 131. Clearly, the conversation personally overheard by the affiant emanating from apartment 910 on May 31, 1968 provided strong corroboration of the informer's tip; this fact, viewed in the light of the other recitations in the affidavit, heretofore set forth, provided far more than mere suspicion that the lottery laws were being violated on the premises. Of course, only the probability, and not a *prima facie* showing of criminal activity is the standard of probable cause. *Beck v. Ohio*, 379 U.S. 89; *Cornish v. State*, 6 Md. App. 167. Equally clear is the principle that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, *United States v. Ventresca*, 380 U.S. 102 that the determination of a magistrate that probable cause exists should be paid great deference by reviewing courts, *Jones v. United States*, 362 U.S. 257; and that when determining whether an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases should be largely determined by the preference to be accorded to warrants, *United States v. Ventresca*, supra. We conclude, within this constitutional framework, that the search warrant was properly issued.

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[1] The informer's reliability can never be established *solely by* reason of the fact that his information proved accurate when acted upon. *Bolesta v. State*, 9 Md. App. 408.

The police observed gambling paraphernalia throughout the apartment in plain view. The door to the apartment had been reinforced by two-by-fours. Several minutes after the officers had entered, the searched Glorioso's person and found a key to the apartment in his trousers.

Appellant Glorioso separately contends that his arrest was illegal and that evidence seized from his person, namely a key to apartment 910, was improperly introduced in evidence at his trial. The substantive evidence testimonially adduced at the trial by the State showed that Lieutenant George Andrew of the Baltimore City Police Department, and F.B.I. Agent David Faulkner, were in the apartment across the hall from apartment 910 on June 13, 1968 preparing to execute the search warrant; that through a peephole, Glorioso was observed to knock at the door of apartment 910; that a man's voice from within the apartment asked "Who is it," to which Glorioso responded "It's me"; and that thereafter "there was a sound of door unlocking, a barrier being let down from inside the apartment, and the latch being taken off the door." According to Agent Faulkner's testimony, he then went into the hall and opened the door to apartment 910 and entered. According to Andrew's testimony, he followed Agent Faulkner, and observed that Glorioso was "partly in the door and partly out"; that he had taken one step into the apartment. Andrew admitted pushing Glorioso the rest of the way into apartment 910.

The trial court found Glorioso's arrest and subsequent search to be lawful on alternative grounds. It concluded that because there was evidence showing that Glorioso had a foot in the apartment, he was properly searched as a participant in the criminal activities there observed. It further ruled that even if Glorioso was not in the apartment, he was in the hallway, which was appurtenant to the apartment and constituted part of the premises authorized by the warrant to be searched.

We held in *Salmon v. State*, 2 Md. App. 513, that a search warrant authorizes a search of persons, places or things, as

particularized in the warrant, for specifically designated property, unlawfully obtained or held, or of evidence of the commission of the crime, including items relating thereto which are purely evidentiary in nature; that a search warrant does not operate as an arrest warrant; that the directive to make an arrest customarily included as one of the commands of the search warrant is a conditional one – valid only if the search reveals the commission of an offense, in which event the arrest is for the offense revealed by the search. It is thus clear that officers armed with a search warrant for particular premises, as here, are not authorized to search all persons found therein. See *Denikos v. State*, 9 Md. App. . Nor would the command of the search warrant to arrest and search all persons participating in the criminal activities support a search of one on the premises who had not committed a crime in the presence of the searching officers. See *Haley v. State*, 7 Md. App. 18.

But whether Glorioso was named in the warrant or not, or whether he was lawfully on the premises to be searched or not, or whether the premises to be searched included the public hallway or not are questions simply beclouding the real issue of whether, under the circumstances, Glorioso's arrest and the subsequent search of his person were lawful. We think they were. A warrantless arrest by a police officer is valid where he has probable cause to believe that a misdemeanor has been or is being committed in his presence or view and that the arrestee is the misdemeanant. *Robinson v. State*, 4 Md. App. 515. That the police had probable cause to believe that the lottery laws were being violated in apartment 910 (a misdemeanor) is clear. They were preparing to execute the warrant when Glorioso knocked on the door and made his identity known simply by stating "It's me." By force alone of that message the reinforced door to the apartment was in the process of being readied for opening when the police, taking advantage of the opportunity thus afforded them, lawfully gained access to the apartment. Seeing lottery paraphernalia in plain view as they entered the apartment, the police had probable cause to believe that because of Glorioso's obvious clandestine identification with

the apartment, he was a participant in the misdemeanor being committed in their presence; indeed, only seconds before entering the apartment, Glorioso had demonstrated to the officers that he was so well known in the apartment that a simple "It's me" greeting sufficed to permit him entrance through the reinforced door. As stated in *Davids v. State*, 208 Md. 377, a crime is committed in the presence of an officer when his senses afford him knowledge that such is a fact; and that where some evidence of a commission of a misdemeanor reaches an officer through his senses, and it is augmented by other strongly persuasive facts in his possession, all of which is sufficient to convey virtual knowledge to any normal mind that the misdemeanor is then being committed, the officer may act upon such information as being tantamount to actual knowledge that the misdemeanor is being committed in his presence.[2] Within these rules, we conclude that appellant was lawfully arrested and that the subsequent search of his person incident thereto was likewise lawful.

JUDGMENTS AFFIRMED;
COSTS TO BE PAID BY
APPELLANTS.

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[2] The affidavit upon which a search warrant is based is not substantive evidence at the trial. *Noel v. State*, 202 Md. 247; *Haley v. State*, *supra*. While the affidavit contained recitations showing Glorioso's involvement with the apartment on May 31 and June 5, 6, 7, and 10, 1968, no substantive evidence thereof was adduced at the trial in support of the legality of his arrest. The only evidence at trial concerning his connection with apartment 910, and all that we here consider, is that showing his activity on the day of his arrest.

APPENDIX F.

(Order Denying Petition for Writ of Certiorari)

(Carroll T. Glorioso v. State of Maryland, In the Court of Appeals of Maryland, Miscellaneous Docket No. 200, September Term, 1970 (No. 546, September Term, 1969,) Court of Special Appeals).

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED by the Court of Appeals of Maryland that the said petition be and it is hereby, denied.

/s/ Hall Hammond
Chief Judge

(COURT SEAL)

Date: October 20, 1970.

APPENDIX G.

(Extracts from Trial Transcript)

I

(The Arrest)

(Andrew) (Direct) "I was in an apartment across the hall from 910 in company with FBI Agent Faulkner and Sergeant (T. 16) L'Ecuyer * * * to serve a search and seizure warrant on apartment 910 * * * I observed Defendant Glorioso come down the hall * * * through a little peephole * * * (T. 18-19) and heard Mr. Glorioso knock on the door * * * of 910 and heard Mr. Glorioso say, "It is me.' * * * we unlocked our door – FBI Agent Faulkner went out first, I went out right behind him * * * I observed Mr. Faulkner went to (T. 22) the door, the door was opened, he went in * * * Mr. Glorioso had one foot in the room and one foot out in the hall, he had took one step. I then told Mr. Glorioso to go into the room, and he told me, he says, you are pushing me in here. I said: I have a search and seizure warrant, you had one foot in and one foot out and you are coming into the room * * * there was another FBI (T. 23) agent and a policeman * * * they were behind us.

(Andrew) (Cross):

(T. 61) (Defense Counsel) "Q. * * * you saw defendant Glorioso coming down the hall, did you see him committing any kind of crime? A. No, Sir.

* * * * * * *

(T. 61) Q. * * * you saw Agent Faulkner go beside Mr. Glorioso into the room * * *. A. Yes, he went in by Mr. Glorioso.

(T. 62) Q. And at that point, Lieutenant, did you see Mr. Glorioso committing anything in a way of a crime? A. No, Sir.

Q. Now, during this period, I suppose that you approached Mr. Glorioso still in the same position that you have reference to, Mr. Glorioso was backing up a little bit. A. No, he was standing, he was right there and I pushed him into the apartment * * * I was letting nobody out of that apartment.

(T. 63) Q. You pushed him in there. A. In front of me, yes, sir.

Q. And at that point he said something to the effect: You are pushing me in. Is that right? A. That is correct.

Q. As I took down your direct testimony, your reply to that was: I said I have a search and seizure warrant and you are coming into the room, right? A. Right, sir.

* * * * * * *

(T. 64) Q. * * * at that point, Lieutenant, were you aware of the fact that the search and seizure warrant that you had was not directed toward the search of the body of Mr. Glorioso? A. No, it was for the apartment at 910.

Q. And for any persons whom you might find in there who might be participating in any kind of criminal offense. That is correct, is it not? A. Right, yes, sir.

Q. And after you said that to Mr. Glorioso, you did, in fact, push him into the room, didn't you? A. Yes, Sir.

* * * * * * *

(T. 77) (Faulkner) (Direct) Q. Can you define with any more precision the point at which Mr. Glorioso was standing in

relation to this apartment? A. All I could say he was standing immediately in front of the door of apartment 910 in the hallway * * * the door was opened by myself and I entered the apartment and the other agent and the other Baltimore City police officers entered right behind me.

* * * * * * *

(T. 80) Q. * * * I'll ask you to describe where Mr. Glorioso was at that point. A. When I reached the door to apartment 910, Mr. Glorioso was standing in front of the door in the hallway. (T. 8,) A. The best of my recollection Mr. Glorioso was standing in the hallway in front of the door and I recall opening the door and going in. And I passed him as I went in. I do not recall any part of his body being past the door. (No cross-examination.)

II

(Timely Objection to Federal Question)

(T. 6) (Defense Counsel) "At this time I move, on behalf of all three defendants to quash the search and seizure warrant, the application therefore on grounds that the warrant on its face fails to show legal probable cause * * * I have prepared this in writing on behalf of Iannone and Sellman, and I had to write in here this morning, Mr. Glorioso's name.

(The warrant was admitted over objection and exception granted (T. 13))

* * * * * * *

(T. 14) (Defense Counsel) "* * * I would ask at this time that all the evidence relative to the arrest and/or search of the defendant Glorioso be taken subject to exception on grounds that this was an illegal arrest, illegal search and seizure.

(The Court) All right, we'll take this subject to exception.

* * * * * * *

(T. 54) (Defense Counsel) Now, Your Honor, insofar as any search of the defendant Glorioso is concerned I wish to review our original objection that any search of Glorioso . . . . " . . . I haven't gotten to the point to be able to examine this officer Andrews with respect if anything he saw Mr. Glorioso committing in the way of a crime *per se* on the basis of his testimony.

(The Court) Then, I'll suspend and make no ruling and give you an opportunity to cross-examine him right now on that limited question.

* * * * * * *

(T. 82-83-84) (Defense Counsel) "* * * at this time, I'm going to renew my original motion * * * this was clearly an illegal search of Carroll Glorioso and like to be heard on it.

(The Court) All right, I'll hear from you first.

(ARGUMENT)

(T. 90) (The Court) I'll overrule your motion. * * *

* * * * * * *

(T. 96) (Prosecutor) Q. When was the search made?

(Defense) I object to this as a matter of record, Your Honor, following the course of the original motion that was made in this case.

* * * * * * *

(T. 97) (Defense) "I object to this for the reasons previously stated.

(The Court) Overruled.

* * * * * * *

(T. 108) (Defense) I object for the reasons previously stated (search was illegal)

III.

(Full Appellate Review)

(T. 10) (The Court) Now, let the record show that the court will examine the warrant, read it, and read the application and affidavit upon which it apparently is issued, if there is any return or inventory on the warrant, I'll overlook that at this time. All right (Defense Counsel) . . . I have read it. I'll hear from you.

(ARGUMENT)

(The Court) Gentlemen, I am ready to rule.

* * * * * * *

(T. 84) (Defense Counsel) " . . . . I am now renewing my original motion. This was clearly an illegal search of Carroll Glorioso and like to be heard on it.

(The Court) All right. Let me hear from (Prosecutor) on that. I'll hear from you first.

(ARGUMENT)

(The Court) Well, the *DiAngelo* case is a little different than the one at bar . . . . "

* * * * * * *

(T. 86) (The Court) " . . . .now, awful fine line of demarcation.

(ARGUMENT)

(The Court) There is one other factor here that has not been mentioned and that is the testimony . . . "

* * * * * * *

(T. 119) (The Court) Wish to argue the merits of the case?

(ARGUMENT)

(The Court) . . . the court announces the following verdicts!

IV

(Waiver of Jury Trial)

(T. 4) (Clerk) That be Court of jury trial?

(Defense Counsel) Your Honor, all three defendants have been advised of their constitutional rights to trial by a jury, and also have the right to elect, to waive, their constitutional right, and elect trial before the court. And, having been fully advised of their rights, Your Honor, all three defendants in this case, Glorioso, Iannone and Sellman, at this time waive their constitutional rights to trial by jury and pray trial before the Court.

(Clerk) As to the *addendum*.

* * * * * * *

(T. 5) Defense Counsel) As to the *addendum*, with respect to the defendant Glorioso, Your Honor, the plea is not guilty, concurrent trial.

(The Clerk) Not guilty, court trial to each. The Court is ready, gentlemen.

(Prosecutor) The State will call Lieutenant Andrew.

* * * * * * *

V.

(The Sentence)

(T. 130) (Court) Mr. Glorioso, as to count two and four of Indictment No. 4357, I impose concurrent sentences in each of those counts. In other words, a general sentence of imprisonment, beginning today, under supervision of the Department of Correction of one year and a fine of one thousand dollars ($1,000.00)

"In the addendum I impose a sentence of imprisonment, beginning today, under the supervision of the Department of Correction, of two years, to run concurrently with the prison sentence in Indictment 4357, a total of two years, which, in my judgment is the minimum the statute calls for."

* * * * * * *

VI.

(An Appurtenance)

(T. 87) (Court) "* * * both Lieutenant Andrew and Agent Faulkner say Glorioso knocked on the door, only common sense that he must have been knocking on the door for the purpose of gaining admission * * * whereupon the door was

opened * * * the purpose obviously of admitting Mr. Glorioso who must have been known to the person on the (T. 88) inside by voice * * * Glorioso was standing in front of the door physically in the hallway. Now whether that is part of the premises I'm not sure. It seems to me that doorstep or the stairway or the area immediately in front of the door is an appurtenance, part of the premises, even though it is a public hallway for purposes of the legality of the search of this sort. But, even if it isn't, the testimony of Lieutenant Andrew is that when he saw Glorioso and he followed Faulkner, Glorioso had actually entered the premises of 910. Now, we know that Lieutenant, as well as the agents, are there for the purpose of carrying out the warrant, they knew or suspected and had probable cause to believe that the crime was being committed inside 910 * * *

* * * * * * *

(T. 89) I won't say it was an arrest, but I think he (Glorioso) was detained by the police long enough to make the search, and after the search got underway the officers could see that there was a crime being committed. They based on the evidence found there, now, certainly if Glorioso was inside the place at the time the search was, no doubt they have a right to search him * * * I think the only reasonable conclusion to make is that Glorioso had come there for the purpose of entering and that he was in the act of being admitted, according to Andrew at least had been partially admitted at the time the officers went in and within moments found this evidence. I'll overrule your motion."

APPENDIX H

(Letter of Notice to File Writ of *Certiorari)*

(Letterhead of Angelo V. Glorioso, Attorney)

November 2, 1970

John F. Davis, Clerk
Supreme Court of the United States
Supreme Court Building
1 First Street, N.E.
Washington, D. C. 20543

RE: Carroll T. Glorioso
v.
State of Maryland

Dear Mr. Clerk:

This is to advise you that I will file a Writ of Certiorari to the Supreme Court of the United States in the above captioned case, which case was denied a Writ of Certiorari by the Court of Appeals of the State of Maryland on October 20, 1970. Said Writ of Certiorari will be filed within the time prescribed by law.

Yours truly,

/s/
Angelo V. Glorioso

CC: Judge Robert B. Watts
Howard Cardin, State's Attorney for Baltimore City.

AVG/fg.

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Supreme Court, U.S.
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APR 23 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1239

CARROLL T. GLORIOSO,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

ON APPEAL FROM THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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v.

STATE OF MARYLAND,

Respondent.

ON APPEAL FROM THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY COMMENTS

This Brief in Opposition to the Petition for Writ of Certiorari is filed pursuant to the request of this Honorable Court.

OPINION BELOW

The opinion of the Court of Special Appeals of Maryland is reported at 10 Md. App. 81, 267 A. 2d 812 (1970). It is attached as Appendix E to the Petition for Writ of Cer-

tiorari (A. 9). The order denying the Petition for Writ of Certiorari in the Court of Appeals of Maryland dated October 20, 1970 (Misc. Docket No. 200, Sept. Term, 1970) is attached as Appendix F to the Petition for Writ of Certiorari (A. 15).

JURISDICTION OF THE COURT

Petitioner alleges that the jurisdiction of this Court is invoked under the provisions of Title 28, U.S.C.A., Section 1257.

QUESTIONS PRESENTED

1. Whether or not the arrest and search of the Petitioner was legally conducted.

2. Whether or not the search and seizure warrant in this case was issued upon a showing of sufficient probable cause.

3. Whether or not Petitioner may now raise questions concerning: (a) failure to transcribe arguments of counsel absent a request therefor, (b) waiver of the right to jury trial, and (c) that his sentence as a second offender under the lottery laws placed him in double jeopardy.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner fails to allege which provisions of the Constitution of the United States are involved though he claims under the heading of Jurisdiction that "rights, privileges and immunities are claimed under the Constitution of the United States."

STATEMENT OF FACTS

On June 13, 1968, at about 2:30 p.m., Lieutenant George Andrew, whose expertise in the investigation, apprehension, and detection of lottery and gamblers was stipulated,

was in the apartment across the hall from Apartment 910, Washington Park Apartments, 111 West Center Street, Baltimore, Maryland. In the apartment with him was FBI Agent David Faulkner, for the purpose of executing a search and seizure warrant for Apartment 910. Through a peephole he saw Petitioner come down the hall and heard him knock on the door of Apartment 910. He recognized Glorioso's voice. A man's voice asked, "Who is it?" and Glorioso responded, "It's me." At this point Lieutenant Andrew and Agent Faulkner opened their door and went out into the hallway. Andrew observed Faulkner go to the door at Apartment 910. The door was opened and Faulkner went in. Glorioso had one foot in Apartment 910 and one foot in the hallway. Lieutenant Andrew then pushed Glorioso the rest of the way into the room, advising him that he had a search and seizure warrant. He observed that the door to Apartment 910 had been reinforced by several two by fours and he had heard scrapings on the door after Glorioso's knock and exclamation. Considerable gambling paraphernalia, indicating a substantial operation, was in full view on the table inside the apartment.

Agent Faulkner testified that he had been with the Federal Bureau of Investigation for five years, and, in addition to normal lottery training in the FBI Academy, had been engaged in the investigation of lottery and other organized gambling crimes since August of 1967. While in the apartment across from 910 with Lieutenant Andrew, he had observed Glorioso leave his automobile on the parking lot outside the building; shortly thereafter saw him on the ninth floor; and heard him knock and state, "It's me." He also heard the sound of the apartment door unlocking and a barrier being let down from inside. The Agent stated he opened the door to Apartment 910 and entered and at

the time Glorioso was still in the hallway standing in front of the door. In a search of Glorioso, conducted subsequent to the discovery of the lottery paraphernalia as aforesaid, a key which fit Apartment 910 was removed from the person of Glorioso.

The affidavit in support of the search and seizure warrant is set forth as Appendix B to the Petition for Writ of Certiorari. In summary, it includes the following averments:

1. Agent Faulkner was advised by a proven reliable informant that Lesse Sellman, employed by Vincent and Tony Iannone (Atlas Vending Company), had advised the informant that Sellman had been given money by Tony Iannone to rent an apartment in Baltimore for the purpose of booking numbers.

2. Agent Faulkner was also advised that Sellman rented furniture with the money given him by Iannone to purchase furniture.

3. Faulkner had learned that Sellman had rented furniture for an apartment at 111 West Centre Street.

4. From the manager and desk clerk at the Washington Park Apartments, 111 West Centre Street, it was learned that Sellman and Tony Iannone had rented Apartment 910.

5. On May 31, 1968, Agent Faulkner heard from within Apartment 910 the sound of an adding machine and a male voice stating, "All we can take is $200" and "Lay off."

6. That one of the males who left this apartment entered an automobile registered to Atlas Vending Company.

7. That on the various dates of observation there was no activity in the apartment prior to 1:30 p.m. or after 6:00 p.m.

8. That one of the individuals seen in the vicinity of the apartment at 111 West Centre Street on four occasions was identified as Carroll Glorioso (Petitioner), who previously had been convicted of gambling charges.

9. Telephone company records revealed long distance calls from Apartment 910, including calls to a restaurant in Washington, D. C., the owners of which were arrested on gambling charges.

10. On one occasion Carroll Glorioso, after parking his car but before entering the apartment building, concealed sheets of white paper under his shirt.

11. That it was Agent Faulkner's opinion, based on his expertise in gambling investigations, that gambling activity was being conducted in Apartment 910.

At trial Petitioner made no request to transcribe argument of counsel and did not raise this point on appeal to the Court of Special Appeals of Maryland. At trial, after the Clerk had advised the three defendants, including Petitioner (as to pleas which had been entered at the time of their arraignment) their counsel (representing all three defendants) indicated that there would be no change in the plea of not guilty and when the Clerk asked if the trial would be by the court or by the jury, counsel, Alan H. Murrell, replied:

> "Your Honor, all three defendants have been advised of their constitutional rights to trial by a jury, and also have a right to elect, to waive their constitutional right, and elect trial before the court. And, having been fully advised of their rights, Your Honor, all three defendants in this case, Glorioso, Iannone and Sellman, at this time waive their constitutional right to trial by jury and pray trial before the court.
>
> "(The Clerk) As to the addendum.

"(Mr. Murrell) As to the addendum, with respect to the defendant, Glorioso, Your Honor, the plea is not guilty, concurrent trial.

"(The Clerk) Not guilty, court trial to each."

Petitioner was convicted of keeping a place for the sale of lottery and possession of lottery paraphernalia and sentenced to imprisonment for one year and a fine of One Thousand Dollars under both charges to run concurrently. He was, thereafter, convicted under the addendum as a second offender and sentenced to two years imprisonment to run concurrently with the sentences previously imposed.

ARGUMENT

I.

THE ARREST AND SUBSEQUENT SEARCH OF PETITIONER WAS LEGALLY CONDUCTED.

Leaving aside the question of the proper issuance of the search warrant, Petitioner alleges in his first and second arguments that the police did not have cause to arrest him since they pushed him from the public hallway into the apartment in which the gambling operation was conducted. Once the police were inside the apartment, they observed lottery paraphernalia in full view and the search of Petitioner conducted inside the apartment revealed that he was carrying a key which fit the door to the apartment.

The validity of the arrest and subsequent search of the Petitioner rests upon a determination of whether the police officers had probable cause to believe that a misdemeanor had been or was being committed in their presence or view. *Robinson v State*, 4 Md. App. 515, 243 A. 2d 879 (1968); *Salmon v. State*, 2 Md. App. 513, 235 A. 2d 758 (1967). In making the determination that the arresting officers had probable cause to believe that Petitioner was

violating the lottery laws, the police could rely upon both the facts known or observed by them as well as upon their expertise. *Davids v. State*, 208 Md. 377, 118 A. 2d 636 (1955); *Johnson v. State*, 8 Md. App. 187, 259 A. 2d 97 (1969).

Admittedly the search warrant for the apartment did not, in and of itself, afford grounds for the arrest of Petitioner, but those facts within the knowledge or observation of the arresting officers clearly afforded them probable cause to believe that the misdemeanor was being committed in their presence or view. The affidavit supporting the search warrant indicated that on four previous occasions Petitioner (known to the officers as having been previously convicted of gambling charges) had been observed in the vicinity of the apartment and on one occasion was observed to be concealing sheets of paper under his shirt as he left his car outside the apartment building. On the day in question, the police, Lt. George Andrew of the Baltimore City Police Department, and Agent David Faulkner of the Federal Bureau of Investigation, were hidden in an apartment across the hall from the apartment thought to contain the gambling operation, observing the door through a peephole. They observed Petitioner approach the door to the apartment, knock, and heard a man's voice from within the apartment ask "Who is it," to which Petitioner responded "It's me," and thereafter the police heard the door being unlocked, a barrier being let down from inside the door and the latch being taken off. As the door to the apartment opened, the police exited from their hiding place and armed with the search warrant, entered the apartment where they observed lottery paraphernalia in full view. At the instant that the police reached the door to the apartment, Petitioner either had one foot in the apartment or remained close to the door and was

pushed or ordered by the police to enter the apartment, where the arrest and search took place.

The Maryland courts have had occasion to examine particular arrests involving lottery operations challenged by persons who contend that they were simply private citizens or strangers lawfully entering the premises without knowledge of the gambling operations conducted therein. In *DeAngelo v. State*, 199 Md. 48, 85 A. 2d 468 (1952), the Court of Appeals of Maryland rejected the arrest of a person who entered a private dwelling which contained lottery tickets when no other facts connected the accused with the gambling operations. In *Delnegro v. State*, 198 Md. 80, 81 A. 2d 241 (1951), the Court upheld the arrest of persons, who entered the building through a heavily barred door containing a lookout window and who were carrying bags containing lottery tickets and money.

The lower court in the case at bar reasoned that Petitioner had been previously identified with the suspect apartment and that his obviously clandestine identification when he knocked upon the door was sufficient to permit him entrance through the door which had been reinforced by heavy wooden barriers. Before their arrival the police had secured the search warrant by demonstrating that they had probable cause to believe that the apartment in question was being utilized to conduct a lottery operation, and upon their entrance into the apartment, they could immediately observe gambling paraphernalia in full view.

On these facts, both the lower appellate court and trial court could conclude that the arresting police officers had sufficient knowledge to conclude that a misdemeanor was being committed by the Petitioner in their presence or

under their view and that the arrest and subsequent search of Petitioner was therefore properly conducted.

II.

THE SEARCH AND SEIZURE WARRANT FOR THE APARTMENT WAS ISSUED UPON A SHOWING OF SUFFICIENT PROBABLE CAUSE.

The principles by which to measure the validity of a search and seizure warrant have become firmly established through a long line of cases in this Court. The warrant must be supported by an application under oath which sets forth those underlying circumstances which would permit the issuing court or magistrate to judge independently the validity of the applicant's conclusion that illegal activities are or have been taking place on the premises to be searched. *Aguilar v. Texas*, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964). *Spinelli vs. United States*, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969) held basically that an informer's tip standing alone without further explanation of the underlying circumstances which lead the informer and the applicant to conclude that an illegal activity was taking place was not sufficient to establish probable cause for the issuance of the warrant. In oft quoted language, this Court there reiterated the established guidelines in this area:

> ". . . In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, Beck v. Ohio, 379 U.S. 89, 96, 13 L. Ed. 2d 142, 147, 85 S. Ct. 223 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, McCray v. Illinois, 386 U.S. 300, 311, 18 L. Ed. 2d 62, 70, 87 S. Ct. 1056 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limita-

> tions or by restrictions on the use of their common sense, United States v. Ventresca, 380 U.S. 102, 108, 13 L. Ed. 2d 684, 688, 85 S. Ct. 741 (1965); and that their determination of probable cause should be paid great deference by reviewing courts, Jones v. United States, 362 U.S. 257, 270-271, 4 L. Ed. 2d 697, 707, 708, 80 S. Ct. 725, 78 A.L.R. 2d 233 (1960)."

To be added to this statement of general principles is the assertion that the resolution of doubtful or marginal cases should be largely determined by the preference to be accorded to judicial warrants. *United States v. Ventresca*, 380 U.S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741 (1965). While the underlying circumstances establishing the validity of the applicant's conclusions may be provided by factual details supplied by the informer alone, *Draper v. United States*, 358 U.S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329 (1959); it may also be established through simply reciting the informer's tip and coupling it with the underlying circumstance as demonstrated by the observations of the police applicants. *Spinelli v. United States, supra; Price v. State*, 7 Md. App. 131, 254 A. 2d 219 (1969); *Gatewood v. State*, 244 Md. 609, 224 A. 2d 677 (1966).

The Court of Special Appeals of Maryland recognized in this case that the undisclosed informer's reliability could not be established by the affiant's conclusory assertion that the informer "has furnished information which has proven to be reliable in the past." It found however, that when the information provided by the informer is corroborated by independent police work by the affiant and the details of this investigation and his observations are recited in the warrant application, the information may be collectively considered in determining the existence, *vel non*, of probable cause for the issuance of the warrant. The affidavit tendered in support of the application for search warrant

in this case is set out in full as Appendix B (A. 2-5). Its pertinent provisions are summarized in the opinion of the Court of Special Appeals of Maryland in this case as follows:

In the application for the warrant, the affiant, an F.B.I. Agent, recited that "a confidential informant who has furnished information which has proven to be reliable in the past" advised that Leslie Sellman was employed by Vincent Iannone, operator of the Atlas Vending Company; that two weeks prior to April 16, 1968, the informant was told by Sellman, who lived at 1210 North Calvert Street, that he had been given money by Tony Iannone to rent and furnish an apartment somewhere in Baltimore for the purpose of booking numbers; that on May 6, 1968, a representative of a furniture rental company advised the affiant that Sellman had rented furniture for an apartment at 111 West Centre Street (the Washington Park Apartments); that on May 7 and 22, 1968, representatives of the Washington Park Apartments advised that Sellman and Tony Iannone had together rented apartment 910 for one year; that on May 31, 1968, the affiant was standing in the public hall in front of apartment 910 at 4:35 p.m. when he overheard a male voice inside the apartment say "All we can take is $200.00," followed by the sound of an adding machine; that on the same day, the affiant heard a male voice inside apartment 910 use the words "lay off"; that at 5:40 p.m. the same day two males left apartment 910 and entered separate Cadillac automobiles, one of which was registered to the Atlas Vending Company; that on June 5, 6, 7 and 10 these same men, one of whom interim investigation revealed to be Glorioso, were again observed "in the vicinity" of apartment 910; that Glorioso had previously been convicted on gambling charges in 1966; that Sellman had previously been arrested in Philadelphia

and Las Vegas; that the telephone in apartment 910 was listed to Sellman and a number of long distance calls had been made therefrom, including calls to a Washington number listed to two named individuals arrested on gambling charges in January, 1968 and known to the Intelligence Unit of Internal Revenue Service to be conducting a large scale gambling operation in Washington; and that on June 12, 1968, Glorioso was observed to park his car, "conceal sheets of white paper" under the front of his shirt, and then go to the vicinity of apartment 910. On the basis of these allegations, the affiant concluded that gambling activity was being conducted on an interstate basis in apartment 910.

It may be asserted that the information contained in the application for the warrant contains far more than a mere suspicion on the part of the police that the lottery laws were being violated on the premises. The supporting information and observations of the police when coupled with their knowledge and expertise in the investigation of gambling operations gave substantial information on which the issuing magistrate might make an independent determination of the validity of the affiant's conclusion that illegal gambling activity was taking place on the premises.

III.

PETITIONER MAY NOT NOW RAISE QUESTIONS CONCERNING (a) THE FAILURE TO TRANSCRIBE ARGUMENTS OF COUNSEL ABSENT A REQUEST THEREFOR, (b) WAIVER OF THE RIGHT TO A JURY TRIAL, AND (c) SENTENCING AS A SECOND OFFENDER UNDER THE LOTTERY LAWS ALLEGEDLY PLACED PETITIONER IN DOUBLE JEOPARDY.

None of the questions presented by the Petitioner in his Arguments III, IV and V, were presented by him in the appeal to the Court of Special Appeals of Maryland.

That Court had no opportunity to pass on or even consider those points which Petitioner now attempts to raise for the first time.

In his Petition for Writ of Certiorari to the Court of Appeals of Maryland, Petitioner did contend that the sentence of two years imprisonment under the addendum charging Petitioner with being a second offender was a nullity because he contended that it increased the length of the sentence once imposed. In the same Petition for Writ of Certiorari, Petitioner contended that he had not voluntarily and understandingly waived his right to a jury trial. At no point in the Petition for Writ of Certiorari to the Court of Appeals did Petitioner attempt to raise the contentions that the failure to transcribe argument of counsel deprived him of his constitutional rights. By his failure to raise these points in the appeal to the Court of Special Appeals of Maryland, Petitioner was precluded from raising the same points in his Petition for Writ of Certiorari to the Court of Appeals of Maryland. This Court has repeatedly recognized that when the highest state court possessing jurisdiction over a particular appellate question has not been presented with that question sought to be reviewed, this Court has no power to review either directly or by Writ of Certiorari. *Johnson v. New Jersey*, 384 U.S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966); *Bailey v. Anderson*, 326 U.S. 203, 90 L. Ed. 3, 66 S Ct. 66 (1945); *Chicago, I.L.R. Co. v. McGuire*, 196 U.S. 128, 49 L. Ed. 413, 25 S. Ct. 200 (1905); *Monks v. New Jersey*, 398 U.S. 71, 26 L. Ed. 2d 54, 90 S. Ct. 1563 (1970); 28 U.S.C.A., §§ 1257 (2), 1257 (3).

In the event that this Court determines to review any of these three questions presented here for the first time, Respondent submits that each fails for substantive reasons.

By failing to request that argument of counsel be transcribed, Petitioner waived his right to present this question on appeal. Petitioner makes no attempt to ascribe error or prejudice to any portion of the argument of counsel and simply seeks a right to review the entire record to discover possible errors not noted and objected to at the time of trial. It has been consistently held that appellate counsel has no right in Maryland to a transcript containing recorded bench conferences and argument of counsel absent a request therefor, and the failure to include such part of the trial proceedings in the appellate transcript does not constitute denial of the right of the accused to full appellate review of the case. *Fletcher and Smith v. State,* 6 Md. App. 219, 251 A. 2d 35 (1969); *Wilkins v. State,* 5 Md. App. 8, 245 A. 2d 80 (1968). It may be pointed out that had trial counsel objected at any point to the context of opposing counsel's argument, that portion of the trial relating to the objection and the trial court's disposition of the objection would be reflected in the trial transcript.

There is no question but that an accused in a state criminal trial may elect a court trial, thereby waiving trial by jury, provided that state imposed procedural standards are met. *Singer v. United States,* 380 U.S. 24, 13 L. Ed. 2d 630, 85 S. Ct. 783 (1965); *Patton v. United States,* 281 U.S. 276, 74 L. Ed. 854, 50 S. Ct. 253 (1930).

Petitioner's waiver of the right to jury trial must admittedly meet the test of *Johnson v. Zerbst,* 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938) which required a showing of an "intentional relinquishment or abandonment of a known right or privilege," which depends in each case "upon the particular facts and circumstances surrounding that case including the background, experience, and conduct of the accused." It has been held generally that the

defendant is bound by the action of his counsel who elects on behalf of the defendant to waive trial by jury in open court and in the presence of the defendant. *Rose v. State,* 177 Md. 577, 10 A. 2d 617 (1940); *Hensley v. United States,* 281 F. 2d 605 (D.C. Cir., 1960); *State v. Jelks,* 105 Ariz. 175, 461 P. 2d 473 (1969); *State v. Skaff,* 22 Wisc. 2d 269, 125 N.W. 2d 561 (1964); *People v. Sailor,* 43 Ill. 2d 256, 253 N.E. 2d 397 (1969); *Tompsett v. Ohio,* 146 F. 2d 95 (6th Cir., 1944). Recently, in *State v. Zimmerman,* 261 Md. 11, 273 A. 2d 156 (1971), the Court of Appeals of Maryland held that before the defendant could assert on direct appeal that he had not voluntarily and understandingly waived his right to jury trial (when the record reflected that the election for trial by the court had been made for him in open court by his counsel), he must affirmatively show that he had in fact not understood that he had waived his right to jury trial. The Court there indicated that the proper forum in such a case lay in Petitioner's right to seek post conviction relief. This approach takes on added meaning in this case where Petitioner makes no allegation that he now desires a Jury trial or that he had no knowledge that he was in fact waiving his right to trial by Jury.

Petitioner's final contention that his trial and sentencing as a second offender under the provisions of Maryland Code Annotated, Article 27, Section 366, placed him twice in jeopardy for the same offense has been rejected on numerous occasions by this Court. *Graham v. West Virginia,* 224 U.S. 616, 56 L. Ed. 917, 32 S. St. 583 (1912); *Oyler v. Boles,* 368 U.S. 448, 7 L. Ed. 2d 446, 82 S. Ct. 501 (1962). In *Gryger v. Burke,* 334 U.S. 728, 92 L. Ed. 1683, 68 S. Ct. 1256 (1948), it was stated:

> "The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or

> additional penalty for the earlier crime. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."

Maryland's highest court has applied the same second offender law to gambling violations without questioning its constitutional validity. *Gatewood v. State, supra.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari to the Court of Special Appeals of Maryland should not be granted.

Respectfully submitted,

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